Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-170

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

COVINGTON HOUSING DEVELOPMENT CORPORATION,
ET. AL. PETITIONERS

VS.

CITY OF COVINGTON,
ET. AL. RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR., Pro Se
736 Highland Avenue
Covington, Kentucky 41011
1-606-491-6278

I hereby certify that a copy of the foregoing petition has been served by the United States mail, upon:

Mr. Charles H. Schaffner, 331 York Street, Newport, Kentucky
Mr. Eugene Siler, U.S. Attorneys Office, Federal Building, Lexington, Kentucky
Mr. Charles P. Wagner, Municipal Building, Third and Court Streets, Covington, Kentucky
Mr. Joseph Condit, 114 East Third Street, Covington, Kentucky, this 30 day of July, 1975

Eddie Thompson Jr.
Eddie Thompson, Jr., Pro Se

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IN THE SUPREME COURT OF THE UNITED STATES

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COVINGTON HOUSING DEVELOPMENT CORP., ET. AL. PETITIONERS

VS.

CITY OF COVINGTON, ET. AL. RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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* * *

Now comes petitioner, Eddie Thompson, Jr., on behalf of the Covington Housing Development Corporation and Eddie Thompson, Jr., and pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on April 23, 1975; petition for rehearing denied on June 5, 1975.

Citations to Opinions Below

I. The opinion of Judge Mac Swinford granting the City's motion to dismiss was granted because plaintiffs did not submit a brief opposing the motion. The reason plaintiffs did not submit a brief is that the City's attorney, Mr. Wagner, and defendant and attorney, Mr. Condit, prevented plaintiffs' attorney, Mr. Clifford Fennell, from submitting a brief; a fact the City's attorney acknowledges in his affidavit to the Sixth Circuit Court of Appeals.

Upon appeal, the Sixth Circuit Court ruled that no appeal was taken. Sixth Circuit did not rule on the City's motion to strike from plaintiff-appellants brief any and all reference to the December 18, 1973, order of the District Court dismissing the City of Covington as a party defendant. The opinion of the Sixth Circuit appears on page 27.

II. The opinion of Judge Mac Swinford granting summary judgment to defendants was not supported by any facts or law. In fact, his recital of Elk Valley Coal Co. v Thompson 150 Ky 614, 150 S.W. 817, supports plaintiff-appellants. In this instance, the Sixth Circuit Court of Appeals has considered none of the facts presented by petitioner and has refused to undertake an independent review of the record as required by Federal Rules of Civil Procedure. Rule 56 (c)

III. The opinion of Judge Mac Swinford dismissing claim by Thompson is equally not supported by fact or law. The Honorable Judge Mac Swinford had not reached the conclusion (that Thompson had not stated a case) when he erroneously dismissed the City of Covington at the cost of plaintiffs, Covington Housing Development Corporation and Eddie Thompson, Jr. The reviewing court did not take an independent review of the record.

IV. Last, but not least, is the fact that an order dismissing Carlton and Wooten was before the Court of Appeals, and the Reviewing Court made no mention of an appeal from that order. Mr. Kinnaird, in his affidavit, had already admitted that Roger Carlton may have taken the action alleged in the complaint and that he no longer worked for the Department of Housing and Urban Development.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 23, 1975. Petition for rehearing was denied on June 5, 1975. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1) and any other applicable section.

STATUTES INVOLVED

The Federal Statutes involved are 42 U.S.C. 1981, 1983, etc., (Act of April 20, 1871) and Civil Rights Act of 1875; 42 U.S.C. 3301, 3303, etc. (Demonstration Cities and Metropolitan Act of 1965)

QUESTIONS PRESENTED

I. (a) Did plaintiffs appeal from order dismissing the City of Covington?

(b) Under federal programs or projects initiated under 42 U.S.C. 3301, etc., is the City a desired party?

(c) Could defendants prevail, where they illegally pressured plaintiffs' counsel into not answering motion?

(d) Can City illegally terminate a Model Cities project in order to deny a black person, or anyone, employment in said project?

II. (a) What proof was there in the original record that Thompson was not authorized to file this suit on behalf of the Corporation?

(b) In a case where defendants had sued plaintiff earlier in his representative capacity, could defendants later claim that agent did not have the power to sue in his representative capacity?

(c) Was Broadus Blythe a managing agent?

(d) The District Court made reference to depositions and interrogatives of other participants in the operation. Were they board members? Who were they?

(e) In what instances were there "internal corporate dissensions" regarding the propriety of this suit?

(f) Were Thompson and others injured by the illegal phasing out of this Model Cities Project, in that the City is still withholding Thompson's salary and that of his staff members?

(g) Would Corporation benefit by this suit?

(h) Did Sixth Circuit Court seek to render judgment which is just, legal, and proper?

III. (a) Did Thompson state the same cause of action as the Covington Housing Development Corporation?

(b) Was Thompson injured by the illegal phasing out of the project?

(c) In a Model Cities project which is illegally phased out for racial reasons, would Thompson, as agent (employee), be entitled to back wages?

(d) Can City of Covington and City Officials, for racial reasons, force me into involuntary bankruptcy by illegally withholding funds that I had already earned by contract?

(e) Can defendants use fraud, or any means available, to deprive Thompson of his constitutional rights?

(f) What did defendants plead regarding Thompson?

IV. (a) Were Roger Carlton and Hobart Wooten desired parties?

(b) Did plaintiffs seek administrative remedies?

(c) Could Roger Carlton and Hobart Wooten cause a Model Cities project to be illegally phased out because the City Manager was opposed to a black person as director of said project?

STATEMENT

This is a suit by a Kentucky Corporation and Eddie Thompson, Jr., severally and jointly. This suit was commenced under 42 U.S.C. 1981, 1983, against the City of Covington, Kentucky, several City Officials, and two HUD Representatives for their arbitrary and capricious actions in phasing out the Covington Housing Development Corporation for racial reasons.

Plaintiffs broadened their pleadings to include 42 U.S.C. 3301, 3303, etc.

The City of Covington, defendants Grimm, Saegeser, Bowman, Wermelling, Royster, Hedrick, Wolfe, Condit, and Woods moved to dismiss, citing, Monroe v Pape 365 U.S. 167.

Mr. Wagner and Mr. Condit prevented plaintiffs' attorney, Mr. Clifford Fennell, from answering motions.

City Officials gave frivilous and unmeritorious answers and asked to take depositions of plaintiffs, Covington Housing Development Corporation and Eddie Thompson, Jr.

Mr. Wagner and Mr. Condit prevented plaintiffs' attorney from attending the depositions, even though Thompson had met with Mr. Fennell on the morning of the deposition, and Mr. Fennell instructed Thompson to go ahead, assuring Thompson that he would be present.

Mr. Wagner and Mr. Condit knew that Mr. Fennell would not appear, and they tricked Broadus Blythe into giving his deposition. They knew that Mr. Blythe was not a managing agent and could not speak for the Corporation.

Defendants then came in with an affirmative defense that the Covington Housing Development Corporation had not authorized the filing of this suit and should be dismissed; which was not true, and which they did not prove.

Mr. Blythe was not authorized to speak for the Corporation.

Judge Mac Swinford granted defendants Summary Judgment. He did not take into consideration any of the argument presented by plaintiffs.

Even if the Corporation had not, or did not ratify this suit, the managing agent, Eddie Thompson, Jr., would have been able to maintain this suit in the name of the Corporation. Elk Valley Coal Co. v Thompson 150 S.W. 817.

For what cause Summary Judgment was granted, or how the Sixth Circuit Court of Appeals could concur, is unknown; but the reasons are inconsistent with Kentucky State Laws or Federal Laws.

This decision leaves many important issues unclear. It makes a mockery of our State and Federal Constitutions.

On what bases the lower courts concluded that if this complaint was profferred by Thompson, it had no merit, gives one an unequivocal feeling that some mem do not respect our Constitutions.

Judge Mac Swinford's decision to grant motion to dismiss Carlton and Wooten was so ridiculous that the Sixth Circuit Court was reluctant to even address that issue, even though it was argued before them.

While Wooten and Carlton are respondents, based on the appeals, we feel that the U. S. Attorneys office supports our position.

REASON FOR GRANTING WRIT

The lower court's decision was so far departed from the accepted and usual course of judicial proceedings. The Sixth Circuit Court's santioning of such departure calls for an exercise of this Court's power of supervision.

The plaintiffs' constitutional rights were violated. The phasing out of a Model Cities project, without citizen participation, to prevent a black from having a job in the project is illegal. North City Area-Wide Council, Inc. v Romney 469 F 2d 1326 (1972); Rodriquez v Barcelo 358 F Supp 43 (1973)

If a complaint charges a state officer not only with deliberately misinterpreting a statute against a plaintiff, but also with purposely singling him out alone for that misinterpretation, it is good against demurer. Burt v City of New York 156 F 2d 791, 792 Bottom

A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Scher v Board of Education of West Orange 424 F 741, 744

Where there has been no formal ratification by the Board of Directors of a corporation at a regular meeting of an unauthorized act of an agent, the question of whether individual acquiescence of failure to disaffirm amounts to ratification depends on the facts of the case, and where the unauthorized act is beneficial to the corporation, and the directors have individual knowledge of it, slight evidence shows ratification, but where the corporation does not derive any benefits from the unauthorized act, or it is doubtful if it has received benefit and no third party person has suffered loss, evidence of ratification by individual acquiescense or failure to repudiate must be clearly shown. Elk Valley Coal Co. v Thompson 150 S.W. 817.

Even if the City was dismissed, 42 U.S.C. 1983 gives a remedy-action at law, suit in equity or other proper proceedings for redress to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position whether they act in accordance with their authority or misuse it. Monroe v Pape 365 U.S. 167.

Under 42 U.S.C. 3301, 3303, the City would be a desireo party.

The approval by the court below of the trial court's decision makes a travesty of the plain meaning of 42 U.S.C. 1981, 1983; 42 U.S.C. 3301, 3303; 28 U.S.C. 1361.

CONCLUSION

This court should grant the petition for Certiorari and hear the issues raised in these important areas of Civil Rights and Federally funded programs.

Respectfully submitted,

Eddie Thompson Jr.

EDDIE THOMPSON, JR., Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET. AL. — PLAINTIFFS

V.

CITY OF COVINGTON, ET. AL — DEFENDANTS

O R D E R

The defendants are given until Monday, December 10, 1973 at 4:00 P. M., to file answers or otherwise plead in this action.

November 15, 1973 — Mac Swinford, Judge

(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

v.

CITY OF COVINGTON, ET AL — DEFENDANTS

MEMORANDUM AND ORDER

This civil rights action commenced under 42 U.S.C. 1983 against the City of Covington and numerous municipal officials alleges racial discrimination in the operation of

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the local Housing Development Corporation. The City has moved to dismiss on the ground that the Civil Rights Act does not contemplate actions against municipalities. The plaintiffs have been afforded an opportunity for submission of briefs and the record is before the court for decision.

It is well-settled that a municipality is not a "person" within the purview of the Civil Rights Act. In Monroe v. Pape, 365 U.S. 167 (1961),

> "the Court held that 42 U.S.C. 1983 . . . was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges, and immunities. At the same time, however, the Court held that a municipality is not a 'person' within the meaning of 1983." Moor v. County of Alameda, 411 U.S. 693, 699-700 (1973).

Accord, City of Kenosha v. Bruno, 412 U.S. 507 (1973); Patrum v. City of Greensburg, Kentucky, 6th Cir., 419 F. 2d 1300 (1969), cert. denied 397 U.S. 990 (1970); Deane Hill Country Club, Inc. v. City of Knoxville, 6th Cir., 379 F. 2d 321 (1967), cert. denied 389 U.S. 975 (1967).

It is ordered that the motion to dismiss filed by the City of Covington be and the same hereby is sustained and that the complaint, insofar as it applies to the City of Covington, be and the same hereby is dismissed at the cost of the plaintiffs.

December 18, 1973 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

V.

CITY OF COVINGTON, ET AL — DEFENDANTS

O R D E R

The motion of the United States for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure requesting that the defendants, HUD Representative Roger Carlton and HUD Representative Hobart Wooten, not be required to answer interrogatories served upon the United States Attorney pending disposition of the motion of the United States to dismiss the action as to these defendants is sustained.

These two named defendants need not answer interrogatories until a ruling of the court is had on the pending motion to dismiss the complaint as to each of them. In the event the motion to dismiss the complaint is overruled, they will be given thirty days from the date of the order-overruling the motion to file answers to the interrogatories.

May 13, 1974 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

v.

CITY OF COVINGTON, ET AL — DEFENDANTS

ORDER

This case is set down for hearing on all pending motions on Tuesday, July 16, 1974, at 1:00 P.M.

June 27, 1974 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT
CORPORATION, ET AL — PLAINTIFFS

V.

CITY OF COVINGTON, ET AL — DEFENDANTS

ORDER

It is ordered and adjudged herein as follows:

1) The motion of the United States to dismiss as to defendants Carlton and Wooten is sustained;

2) The complaint, insofar as it applies to Roger Carlton and Hobart Wooten, is dismissed at the cost of the plaintiffs.

See Memorandum.

June 27, 1974 /s/ Mac Swinford, Judge
(retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT
CORPORATION, ET AL — PLAINTIFFS

v.

CITY OF COVINGTON, ET AL — DEFENDANTS

MEMORANDUM

The complaint in this civil rights action alleges that on October 5, 1972, the plaintiff contracted with the City of Covington for the development of a housing complex pursuant to the Demonstration Cities and Metropolitan Development Act, 42 U.S.C. 3301, et seq. Because the Executive Director of the housing authority was a Negro, however, city officials deliberately misrepresented certain facts to the Department of Housing and Urban Development (hereinafter: HUD) in a successful attempt to block further funding of the project. The publicity surrounding the curtailment and the defendants' false allegations of an overspent budget defamed the character of the Housing Development Corporation Director,

Eddie Thompson, Jr. The plaintiff seeks damages and/or an injunction directing the revival of the project.

On December 18, 1973,the complaint was dismissed as to the City of Covington on the ground that a municipality is not a "person" within the contemplation of the Civil Rights Act, 42 U.S.C. 1981, et seq. City of Kenosha v. Bruno, 412 U.S. 507 (1973). The record is now before the court on the motion by the United States to dismiss HUD employees Roger Carlton and Hobart Wooten for lack of jurisdiction. The plaintiff has responded that jurisdiction is empowered as to these defendants under 28 U.S.C. 1361 and 5 U.S.C. 701, et seq.

A preliminary appraisal of the complaint indicates that Carlton and Wooten are not proper parties defendant. Wooten is deceased while Carlton is no longer a departmental employee. Further, although the complaint demands substantial damages in lieu of renewed funding, the plaintiff has named as defendants only the area HUD representatives. These individuals clearly lack "the ability and authority . . to effectuate the relief which the (plaintiff) seeks." Ceballos v. Shaughnessy, 352 U.S. 599, 603 (1957); see also Williams v. Fenning, 332 U.S. 490 (1947); Boles v. Greeneville Housing Authority, 6th Cir., 468 F. 2d 476 (1972); 7 Wright and Miller, Federal Practice and Procedure, Section 1622; contra Rodriguez v. Barcelo, D. P.R., 358 F. Supp. 43, 48-49 (1973).

Even if accorded an opportunity to remedy this deficiency, the allegations of the complaint reveal this action as one against the United States and thus barred by the doctrine of sovereign immunity. It is well settled that

the United States, its agencies, and officers are not suable in the absence of its consent. Kawananakoa v. Polyblank, 205 U.S. 349 (1907). The identity of the defendant is ascertained not from the style of the complaint but by the manner in which the judgment would be framed. Simons v. Vinson, 5th Cir., 394 F. 2d 732, 736 (1968), cert. denied 393 U.S. 968 (1968). Where, as here, the relief sought would require affirmative government action or deplete public funds, the action is one against the United States.

> "The general rule is that a suit is against a sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' Larson v. Domestic & Foreign Corp. . . . . 337 U.S. 682, 704 (1949). Dugan v. Rank, 372 U.S. 609, 620 (1963).

See also Hawaii v. Gordon, 373 U.S. 57 (1963); Sierra Club v. Hickel, 6th Cir., 467 F. 2d 1048, 1051 (1972), cert. denied 411 U.S. 920 (1973); Arthur v. Fry, E.D. Tenn., 300 F. Supp. 622 (1969). An exception to this rule prevails where it is alleged that "the federal official acted beyond his statutory authority or . . . in an unconstitutional manner or under a statute which is constitutionally void." Rothgeb v. Statts, S.D. Ohio, 56 F.R.D. 559, 561 (1972); Malone v. Bowdoin, 369 U.S. 643, 647 (1962). Unlike the arbitrary and capricious action attacked in other actions commenced under the Demonstration Cities and Metropolitan Development Act, North City Area-Wide Council, Inc. v Romney, 3d Cir., 428 F. 2d 754, 758 (1970); Coalition for

United Community Action v. Romney, N.D. Ill., 316 F. Supp. 742 (1970), the complaint in the case at bar bears no suggestion of an excessive or unconstitutional exercise of authority. Even if it be determined that federal officials acted erroneously, the relief demanded patently requires "affirmative action on the part of the sovereign or the expenditure of funds from the public treasury." Rothgeb v. Statts, supra; Benson v. City of Minneapolis, D. Minn., 286 F. Supp. 614, 619-620 (1968).

While the above conclusion is alone sufficient for dismissal, it should additionally be noted that the plaintiff has failed to pursue administrative remedies. The exhaustion requirement is a judicial construct intended to "allow an administrative agency to perform functions within its special competence -- to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1972); McKart v. United States, 395 U.S. 185 (1969). Although not literally incorporated into either statute, it is well settled that the doctrine is an inherent part of both the Administrative Procedure Act, Holland Furnace Company v. Percell, W.D. Mich., 125 F. Supp. 74, 80 (1954), and 28 U.S.C. 1361, Beale v. Blount, 5th Cir., 461 F. 2d 1133, 1137 (1972); Richardson v. United States, 3d Cir., 465 F. 2d 844, 849 (1972), cert. denied 410 U.S. 955 (1973).

The only suggestion of an attempted administrative exhaustion is the revelation in the memorandum opposing dismissal of a letter of complaint in March, 1973, and other unspecified contacts with the Louisville, Kentucky, HUD office. Although hopeless administrative attempts for

redress are unnecessary, Ogletree v. McNamara, 6th Cir., 449 F. 2d 93, 99 (1971); Nemitz v. Norfolk and Western Railway Co., N.D. Ohio, 287 F. Supp. 221, 230 (1968), the plaintiff in the case at bar has alleged neither such futility nor an attempted compliance with the department's "administrative remedies validly established by regulation . . . ." National Lawyers Guild v. Brownell, D.C. Cir., 255 F. 2d 552, 557 (1955), cert. denied 351 U.S. 927 (1956); 24 C.F.R. Parts I and II.

An order will be entered sustaining the motion filed by the United States to dismiss defendants Carlton and Wooten.

June 27, 1974 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

VS:

CITY OF COVINGTON, ET AL — DEFENDANTS

O R D E R

On July 16, 1974, came the plaintiffs by Clifford R. Fennell, their attorney and the defendants by Charles Wagner and Joseph Condit, their attorneys.

The Court heard counsel and being advised reserved its ruling on all pending motions.

The plaintiffs were given until July 26, 1974 to amend their pleadings.

The case is continued until further orders.

July 17, 1974 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL PLAINTIFFS

v.

CITY OF COVINGTON, ET AL DEFENDANTS

ORDER

It is ordered and adjudged herein as follows:

1) That the motion for summary mudgment filed by defendants Grimm, Sageser, Bowman, Wermeling, Simpson, Royster, Hedrick, and Wolfe, be and the same hereby is sustained;

2) That the complaint be and the same hereby is dismissed at the cost of the plaintiff, Eddie Thompson, Jr.

See Memorandum.

September 11, 1974 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL PLAINTIFFS

v.

CITY OF COVINGTON, ET AL DEFENDANTS

MEMORANDUM

The complaint in this civil rights action commenced by the Covington Housing Development Corporation and its executive director alleges that on October 5, 1972, the corporation contracted with the City of Covington for the development of residential areas under the Demonstration Cities and Metropolitan Development Act, 42 U.S.C. 3301, et seq. Because the executive director of the Authority was a Negro, city officials deliberately misrepresented certain facts to the Department of Housing and Urban Development in a successful attempt to halt further funding to the project. The corporation alternately seeks damages or reinstatement of the development, while Thompson demands renumeration for the defendants' racist hiring practices and defamatory allegations of fiscal irresponsibility.

Orders entered on December 18, 1973, and June 27, 1974, directed the dismissal of the complaint as to the City of Covington and certain federal officials. The record is now before the court on the defendants' motion for summary judgment on the ground that Thompson lacks the capacity to sue in the name of the Covington Housing Development Corporation. It is contrarily asserted that the plaintiff's power

to initiate this action is derived from his managerial position as reflected in governing statutes and corporate records; that several directors informally agreed to the commencement of this action; and that the corporation has ratified Thompson's action. An examination of the cited standards compels dismissal of the complaint.

The plaintiff's assertion of an inherent authority to institute this action in the name of the entity reveals a fallacious interpretation of both the corporate records and the legal principles outlining the extent of a manager's authority. Kentucky law vests control over corporate affairs in a board of directors, "except as may be otherwise provided in the articles of incorporation." K.R.S. 271A.175.[1] The board may in turn delegate a portion of its decisionmaking authority to responsible corporate officers:

> "All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws." K.R.S. 271A.250(2).

See Har-Bel Coal Company v. Asher Coal Mining Company, Ky., 414 S.W. 2d 128 (1966). The Articles of the Covington Housing Development Corporation direct the board of directors to "appoint such officers and agents as the affairs of the corporation may require and to define their duties . . . ."

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[1]Although incorporated under K.R.S. Chapter 273, the provisions of Chapter 271A are applicable to "any corporation formed under the laws of this State unless the statutes relating to a corporation of that kind either are inconsistent with this chapter or state that the provisions of this chapter do not apply to it." K.R.S. 271A.015(1).

Article III. The responsibilities of the executive director are thus enunciated in the corporation's bylaws:

> "The Executive Director shall be the Chief Executive Officer of the corporation. He shall have custody of the Corporation funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation. He shall deposit all monies and other valuable effects in the name, and to the credit of the corporation in such depositories as may from time to time be designated by the Board of Directors. He shall have all of the general powers and duties which are usually vested in the office of the Chief Executive Officer of the Corporation." Article V, Section 4.

While the executive director is not expressly denied the authority to institute legal proceedings, the court is cited to no articles, bylaw or resolution vesting such responsibility in the plaintiff.

> "Authority to bind the corporation must come either from the by-laws or the board of directors, or the action of the officer must be of the nature that comes within the apparent scope of his employment . . . . The mere representations of a claimed agent, even when coupled with signing a paper in such capacity, are not sufficient to show his agency or the extent thereof." Har-Bel Coal Company v. Asher Coal Mining Company, supra at 130.

Muir v. Glassbrenner Motors Company, 211 Ky. 1, 4 (1925); Caddy Oil Co. v. Sommer, 186 Ky. 843, 847 (1920). The depositions and interrogatories of other participants in the operation reveal that the executive director was at no time vested with the authority to commence litigation; indeed, the corporate minutes strongly suggest that Thompson was not even a company official at the time this action was initiated.

While a managing director enjoys a broad range of commercial responsibility, the court is unaware of any decision construing in such inherent control the right to commence litigation of this magnitude. Rather, it is well settled that a manager's authority is limited to the conduct of ordinary business affairs:

> "(T)he general business of corporations is frequently entrusted to the management of a general manager . . . , who has the power to bind the corporation by acts within the scope of his apparent authority. Such authority is not limited by the fact that the general manager is also the president or other officer of the corporation, for it is not incident to such other office, but is incident to the management of the business. . . . He has been deemed by numerous authorities to be the principal officer of the corporation, having general charge of those business matters for the carrying on of which the company was incorporated, and he has the implied or ostensible power to do any act which is usual or necessary in the ordinary transaction of the company's business." 19 Am.Jur. 2d "Corporations" Section 1174, p. 599.

See also Gaddie v. Collins of Kentucky, Ky., 248 S.W. 2d 722, 723 (1952); Model Bus. Corp. Act Ann. 2d, Section 50, Paragraph 2, p. 90; Note, 40 Ky. L.J. 184 (1952). The powers implied in such a governing director typically include: consummating contracts incidental to corporate operations; procurement of equipment; employing and supervising employees in the course of business; selling goods; receiving payment of accounts; and directing the ordinary affairs of the business. Restatement, Second, Agency, Section 73. The frequently added authority to commence necessary litigation, see Custer Channel Wing Corporation v. Frazer, S.D. N.Y.,

181 F. Supp. 197 (1959); Annot., 10 A.L.R. 2d 701; contra Fanchon & Marco, Inc. v. Paramount Pictures, S. D. N.Y., 107 F. Supp. 532, 538 (1952), reversed on other grounds 2d Cir., 202 F. 2d 731 (1953), is subject to the same limitations attending the manager's other functions: "the authority . . . is normally restricted to litigation incidental to the regular course of the corporation's business." Note, 50 Ky. L.J. 92 (1961): see Ky. Penn. Oil & Gas Corp. v. Clark, 247 Ky. 438, 450-451 (1933); Rasnick v. W. M. Ritter Lumber Co., 187 Ky. 523 (1920). Even this circumscribed power is negated in the event of internal corporate dissension regarding the propriety of suit. See Contee Construction Co. v. Cay Construction Co., Fla., 221 So. 2d 792 (1969); Note, 50 Ky. L.J. 92 (1961). Thompson's litigation relates not to ordinary business affairs but is an extraordinary attempt to revive an enterprise which the board of directors ordered terminated on March 16, 1973.

The conclusion that the plaintiff acquired no inherent power to initiate this action is buttressed by Kentucky decisions narrowly defining the functions exercisable by a single officer. Thus, the court in Caddy Oil Co. v. Sommer, 186 Ky. at 847, ruled that a president's general administrative authority did not embrace the right to contract for the sale of corporate property; "(t)his . . . authority is . . . limited and governed by the character of business, in which the corporation is engaged." Banco Ky. Co's Rec'r v. Nat'l Bk. of Ky.'s Rec'r, 281 Ky. 784 (1939); Empire Coal Mining Co. v. Empire Coal Co., 183 Ky. 699 (1919); see also Burley Tobacco Co. v. Vest, 165 Ky. 762 (1915). Similarly, the expansive power "to transact

all kinds of business", does not authorize a general manager to sell corporate property or bind the company to a contract unconnected with the business of the enterprise. Elk Valley Coal Company v. Thompson, 150 Ky. 614 (1912).

The plaintiff's reliance upon an informally granted authority to commence this litigation ignores the "well settled doctrine that a corporation can act only through its directors at an official meeting regularly held, and that its acts can be proven only by the records of such meeting." Bastin v. Givens, Admx., 170 Ky. 201, 205 (1916); Clay v. Mr. Holly Development Company, Ky., 464 S.W. 2d 621, 624 (1971); Star Mills v. Bailey, 140 Ky. 194 (1910). See also Paducah Newspapers, Inc. V. Goodman, 251 Ky. 754 (1933); Kozy Theatre Company v. Love, 191 Ky. 595, 601-602 (1921); a business will not be bound by agreements secured among isolated directors. Caddy Oil Company v. Sommer, 186 Ky. at 847; see 19 Am.Jur. 2d "Corporations", Section 1157. The claimed ratification of Thompson's decision to sue is similarly unsupported by any suggestion of express or implicit approval of the plaintiff's action; see Tarrants v. Henderson County Farm Bureau, Ky., 380 S.W. 2d 274, 277 (1964); Catlettsburg & Buchannan Telephone Co. v. Bond, 262 Ky. 106, 108 (1936); Harlan, Etc., Co. v. Eastern Construction Co., 254 Ky. 135, 145 (1934); Paducah Newspapers, Inc. v. Goodman, 251 Ky. at 758-759.

A finding that the corporate plaintiff is not properly a party to this action compels a secondary determination whether the action should be dismissed or retained for resolution of the claims proffered by the individual plaintiff. It is initially apparent that Thompson has no personal remedy for injuries suffered by the Covington Housing Development Corporation. See Mullins v. First

National Exchange Bank of Virginia, W.D. Va., 275 F. Supp. 712, 721 (1967). Further, the deprivations allegedly inflicted upon the plaintiff individually are insufficient to justify retention of jurisdiction: the slanderous utterances on the part of the defendants do not evoke a cause of actior under the Civil Rights Act, 42 U.S.C. 1981, et seq; Azar v. Conley, 6th Cir., 456 F. 2d 1382, 1389 (1972); Church v. Hamilton, 3d Cir., 444 F. 2d 105, 106 (1971); Hopkins v. Wasson, E.D. Tenn., 227 F. Supp. 278, 281 (1962), aff'd 6th Cir., 329 F. 2d 67 (1964), cert. denied 379 U.S. 854 (1964). The reference to discriminatory hiring is unsupported by factual allegations, Fletcher v. Hook, 3d Cir., 446 F. 2d 14 (1971); Guedry v. Ford, 5th Cir., 431 F. 2d 660 (1970), and of doubtful merit in view of the plaintiff's continued status with the housing authority.

An order will be entered sustaining the defendants' motion for summary judgment and dismissing the complaint.

September 11, 1974 /s/ Mac Swinford, Judge

(retyped copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

V.

CITY OF COVINGTON, ET AL — DEFENDANTS

O R D E R

The order of this court, entered on September 11, 1974, on a finding that a motion for summary judgment filed by the defendants was sustained, failed to state the names of the defendants, Joseph T. Condit and Bull L. Woods, who had filed a separate motion for summary judgment on August 8, 1974.

The order of September 11, 1974, is hereby amended to include among the named defendants set forth in the order the names of Joseph T. Condit and Bill L. Woods.

September 13, 1974 — /s/ Mac Swinford, Judge

(Retyped Copy)

NOT FOR PUBLICATION

No. 74-2196

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COVINGTON HOUSING DEVELOPMENT CORPORATION, A Kentucky Corporation
EDDIE THOMPSON, JR.,
Plaintiffs-Appellants,
v.
CITY OF COVINGTON, et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed April 23, 1975.

Before: PHILLIPS, Chief Judge, McCREE and LIVELY, Circuit Judges.

PER CURIAM. This is an appeal from an order dismissing a complaint brought under 42 U.S.C. §§ 1981 and 1983 to redress discrimination alleged to have been practiced by the City of Covington and certain of its officials in connection with the development of residential areas under the Demonstation Cities and Metropolitan Development Act, 42 U.S.C. § 3301, et seq. The action against the City of Covington was dismissed in an earlier order from which an appeal was not taken on the ground that a municipality is not a person for the purposes of these Civil Rights Acts. The action was brought by Eddie Thompson, a Negro, who is the executive director of the Covington Housing Development Corporation

(HDC) and in behalf of the corporation. The summary judgment dismissing the action determined that the corporate plaintiff was not properly a party because its directors had not authorized the executive director to initiate the action. The district court also dismissed the action against Thompson on the ground that his reference to discriminatory hiring was unsupported by factual allegations.

The district court correctly held that the individual plaintiff Thompson was not authorized to initiate or prosecute this action on behalf of his corporate employer. The record discloses no direction to sue or consent by the board of directors of HDC to this suit on behalf of the corporation by Thompson.

In the complaint Thompson also sought relief for violation of his civil rights. He may not recover personally for wrongs allegedly suffered by the corporation which he directed. He and the corporation are separate beings in the eyes of the law. We have carefully searched the record for evidence that the civil rights of the plaintiff Thompson have been infringed by any of the defendants-appellees and have found none. The district court had no jurisdiction over claims of slander by the defendants or injury to Thompson's reputation. It could only consider infringement of rights protected by the United States Constitution or the Civil Rights Act under which this action was brought, 42 U.S.C. §§ 1981 and 1983. Our review of the record leads to the conclusion that no showing of su[illegible] infringement was made, and that the defendants were entitled to judgment in their favor as a matter of law. Under these circumstances summary judgment was properly granted.

Affirmed. No costs on appeal.

NO. 74-2196

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COVINGTON HOUSING DEVELOPMENT CORPORATION,)
A Kentucky Corporation)
EDDIE THOMPSON, JR.)
)
Plaintiffs-Appellants) O R D E R
)
v.)
)
CITY OF COVINGTON, et al.)
)
Defendants-Appellees)

BEFORE: PHILLIPS, Chief Judge, McCREE and LIVELY, Circuit Judges.

Plaintiff-appellants' petition for rehearing with a suggestion for rehearing en banc having come on for consideration and less than a majority of the judges having favored consideration en banc, the petition has been referred to the original panel.

Upon consideration of the petition for rehearing the court concludes that the issues raised therein were fully considered prior to the initial disposition of the case. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

Filed June 5, 1975

Clerk /s/ John P. Hehman

(Retyped Copy)

Supreme Court, U. S.
FILED
SEP 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-170

EDDIE THOMPSON, JR.,
Petitioner,

vs.

CITY OF COVINGTON, et al.,
Respondents.

BRIEF OF RESPONDENTS IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-170

EDDIE THOMPSON, JR.,

Petitioner,

vs.

THE CITY OF COVINGTON, BERNARD GRIMM, WILLIAM SAGESER, CARL BOWMAN, GEORGE WERMELING, JAMES SIMPSON, PAUL ROYSTER, JUNE HEDRICK, DAN WOLFE, JOE CONDIT, BILL WOODS, ROGER CARLTON AND HOBART WOOTEN,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS, CITY OF COVINGTON, BERNARD GRIMM, WILLIAM SAGESER, CARL BOWMAN, GEORGE WERMELING, JAMES SIMPSON, PAUL ROYSTER, JUNE HEDRICK, DAN WOLFE, JOE CONDIT AND BILL WOODS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case was commenced in the United States District Court for the Eastern District of Kentucky by the Petitioner, Eddie Thompson, Jr., and the Covington Housing Development Corporation (hereinafter H.D.C.) against the City of Covington, and Mayor, Commissioners and certain employees of the City and two HUD Representatives

under Title 42, United States Code, Sections 1981 and 1983.

The City of Covington filed a Motion to dismiss it as a party-defendant since it was not a proper party defendant, as it was not a person within the purview of the Civil Rights Act.

Subsequently, the City of Covington filed an Answer, setting forth as some of its defenses the facts set forth in its Motion heretofore referred, and the fact that the Plaintiff, Covington Housing Development Corporation, should be dismissed, since it did not authorize the filing of this action.

The Defendants-Respondents, Bernard Grimm, William Sageser, James Simpson, Carl Bowman, George Wermeling, Paul Royster, June Hedrick and Dan Wolfe, filed their Answer, setting forth as part of their defense that fact that the Plaintiff, H.D.C., did not authorize the filing of this action. To the same effect were the Answers of the Defendants-Respondents, Billy L. Woods and Joseph T. Condit.

On November 20, 1973, the depositions of Eddie Thompson, Jr. and Broadus Blythe, Chairman of the H.D.C., were taken by the defendants.

On December 18, 1973, the District Court dismissed the defendant, City of Covington, as a party defendant.

The Plaintiffs served Interrogatories, in April of 1974, upon the Defendants, Paul Royster, Bernard Grimm, George Wermeling, William Sageser, James Simpson, June Hedrick and Dan Wolfe. Subsequently, they filed a Motion for Summary Judgment and an Order dismissing the Plaintiff, H.D.C., as a party plaintiff, with a Memorandum in support. Subsequently, the Plaintiffs filed a Brief in opposition to said motion. Thereafter, the said Defendants-Respondents filed a Reply Brief.

On June 26, 1974, the Plaintiffs filed a Motion for Summary Judgment with a Brief in Support thereof. On July 11, 1974, the Affidavit of June Hedrick was filed and on July 12, 1974, a Reply Brief to Plaintiff's Motion for Summary Judgment was filed.

On August 8, 1974, the Defendants-Respondents, Joe Condit and Billy L. Woods, filed their motion for Summary Judgment with a Memorandum in support thereof.

On September 11, 1974, the District Court entered an Order and Memorandum sustaining the Motion of the Defendants-Respondents, Bernard Grimm, William Sageser, Carl Bowman, James Simpson, George Wermeling, Paul Royster, June Hedrick and Dan Wolfe, for Summary Judgment and dismissing the Complaint. On September 13, 1974, the District Court entered an Order amending the Order of September 11, 1974, to include the Defendants-Respondents, Joe Condit and Billy Woods, as to sustaining Motion for Summary Judgment as to them.

On October 11, 1974, a Notice of Appeal was filed with regard to the Order of September 11, 1974.

On April 23, 1975, the United States Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court stating that it was correct in holding that the individual Plaintiff, Thompson, was not authorized to initiate or prosecute this action on behalf of his corporate employer, and that the civil rights of Thompson have not been infringed.

On May 6, 1975, Thompson, filed a motion in the Court of Appeals for a rehearing en banc, which was refused on June 5, 1975.

(FACTS)

The idea of a housing development corporation had been in existence approximately two years. HUD's letter of December 1, 1971, raised certain questions pertaining to the revolving loan fund and questions in relation to the Housing Development Corporation Project. Part of these questions were answered on or about February 24, 1972. However, the project was on "hold" until these questions were resolved.

The "hold" action remained in effect until mid October, 1972, and at that time it was released because all questions had been adequately answered. As a result, the project began to staff up.

Originally, the American Urban Peoples Coalition (a corporation), in June 1972, requested to become the operating agency for the Housing Development Corporation Project. At this time, Eddie Thompson, Jr. was the President or Officer of this corporation. However, it was a corporation organized for profit and Federal Regulations prohibited it from holding and using the monies under the program involved.

Thus, the non-profit corporation called the Covington Housing Development Corporation (H.D.C.) was formed by an attorney, apparently retained by Eddie Thompson, Jr., on or after August 27, 1972.

Five members of the Board of Directors were appointed by the American Urban Peoples Coalition, and five members of the Board of Directors were appointed by the Mayor and Board of Commissioners of the City of Covington, in various fields of endeavor, so as to give the expertise and knowledge of all facets of housing construction.

The H.D.C. entered into a contract with the City of Covington, and said contract is dated October 5, 1972.

Dave Johnson, a Black, was the Acting Director of the Model City's program at that time (and was the Acting Director until Janury 29, 1973). Eddie Thompson, Jr., after his appointment as the Executive Director of the H.D.C., on or after October 11, 1972, conferred with Dave Johnson, for all policy matters concerning the H.D.C., and only went to the Staff of the Model City's program for implementation of decisions that they had already reached.

On December 5, 1972, the scope of services which had been previously prepared by Dave Johnson and Eddie Thompson for the Third Action Year starting December 1, 1972, was rejected by HUD and a new one requested. A letter from HUD advised that no supplemental funds should be expended until an adequate scope of services and production schedule was submitted. Further, it was required that the source of funding which would be drawn in by the supplemental funds should be identified. After the rejection of December 22, 1972, Eddie Thompson then came to June Hedrick for approval of the budget and scope of services that had been prepared by Eddie Thompson, Jr., and for assistance in developing this into an acceptable form so as to get the Housing Development Project off of "hold" with HUD. The scope of services referred to was submitted to HUD on December 14, 1972, in an extremely inadequate manner, according to HUD.

HUD's letter of December 22, 1972, outlined what changes would be necessary to bring the scope of services to an adequate level.

A new scope of services had been sent to HUD on January 2, 1973.

On January 5, 1973, a Moratorium was announced by the Federal Government on all subsidized housing programs. This Moratorium cut off all funds, except for existing, operating programs. Due to the fact that this

original contract with the City was signed in October, 1972, and extended through November 30, 1972, there had not been sufficient time to get this program into an operating condition when the sudden Federal Moratorium was announced in January, 1973.

The success of the H.D.C. was totally removed by this Moratorium.

Dave Johnson, who was the Acting Director of the Model City Program until January 29, 1973, had the duty to inform the City Commission of the activities of the Model City's program, to present the facts and reports, etc., which would have, and did include the H.D.C., for approval by the City Commission.

The Department of Housing and Urban Development (Atlanta E.E.O. Office), conducted an investigation of the charge filed with them by Eddie Thompson, Jr., charging racial discrimination and found no factual evidence in support of his claims. The letter of November 27, 1973, from the Regional Administrator is attached hereto as an exhibit. Appendix to Brief of Defendant-Appellees as filed in the Sixth Circuit Court of Appeals, P. 100.

ARGUMENT

The Petition for a Writ of Certiorari should be denied for the reasons that:

I. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE DISTRICT COURT IN GRANTING THE RESPONDENT, CITY OF COVINGTON, MOTION FOR SUMMARY JUDGMENT WAS CORRECT UNDER APPLICABLE LEGAL PRINCIPLE.

a) The District Court was required by Established Judicial Precedent to Dismiss the City of Covington as a Defendant to this Action.

The first issue presented by the Petitioner for review to the Court concerns whether the Trial Court was correct when, in its Order of December 18, 1973, it dismissed the City of Covington as a Defendant.

The District Court in dismissing the City as a defendant in this action followed established judicial precedents. The legislative aims of 42 U.S.C. § 2983, which this action was commenced under, was thoroughly discussed by this court in *Monroe* v. *Pope,* 365 U.S. 167 (1961). In *Monroe* the court concluded that a municipality is not a "person" within the purview of the aforementioned section of the United States Code stating the following:

> the response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by this Act . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them. *Id.* at 191.

See also, *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973); *Patrum* v. *City of Greensburg, Kentucky,* 6th Cir., 419 F2d 1300 (1969) cert. denied 397 U.S. 990 (1970); *Deane Hill Country Club, Inc.,* v. *City of Knoxville,* 6th Cir., 379, F2d 321 (1967), cert. denied 389 U.S. 975 (1967).

The petitioner's vicious allegations that the City's attorney, Charles Wagner, along with respondent Joseph Condit prevented his former counsel, Clifford Fennell, from submitting a brief or from attending depositions in reply to the City motion to dismiss are completely unsupported by any kind of factual references. In fact, the allegations are so frivolous that the petitioner failed to raise it in his brief to the Sixth Circuit Court of Appeals.

In reply to the question which was raised by the petitioner concerning the desirability of the City under 42 U.S.C. Sec. 3301 and 3303 we direct the Court's attention to a copy of the original complaint, (Appendix of Defendants Appellees filed in the Sixth Circuit Court of Appeals, P. 1) which shows that the only section of the United States Codes which this action was commenced under were 42 U.S.C. 1981 and 1983. No where in the complaint were sections 3301 and 3303 raised. Since, there has been no amendment to the original complaint the petitioner's reference to 3301 and 3303 is unwarranted.

b) The Court of Appeals Did Not Have Jurisdiction To Hear the Issue of the Dismissal of the City of Covington For Rule 4 (a) of the Federal Rules of Appellate Procedure Requires that an Appeal Be Taken Within Thirty Days of the Entry of the Order, Which the Petitioner Failed To Do.

The Sixth Circuit Court of Appeals has a statutory requirement that appeals from District Courts must be filed

within a prescribed period. Rule 4 (a) of the Federal Rules of Appellate Procedure, provides in part:

> In a civil case . . . in which as appeal is permitted by laws as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment of order appealed from . . .

Since the order to dismiss the City of Covington was entered on December 18, 1973, it is evident, to all except the petitioner, that the thirty day appeal period had long expired when Notice of Appeal was filed on October 11, 1974. Therefore, Thompson's contention that the Court of Appeals erred is just one of his numerous ficticious allegations.

Further, the Court should also note that the petitioner's petition is void of any fact supported allegation that the City of Covington discriminated against him or any other person, black or white, in its dealings with the H.D.C.

II. NEITHER THE ARTICLES OF INCORPORATION OR THE BY LAWS OF THE COVINGTON HOUSING DEVELOPMENT CORPORATION AUTHORIZED EDDIE THOMPSON TO FILE THIS ACTION IN THE NAME OF THE CORPORATION.

The Petitioners ask rhetorically "What proof was there in the original record that Thompson was not authorized to file this suit on behalf of the Corporation?" First, even though the petitioner's brief has the Covington Housing Development Corporation as a petitioner, it is well worth noting that only Eddie Thompson appealed the decision of the Sixth Circuit Court of Appeals as is evident by the

official records of this Court. Hence, it is obvious that the aforesaid question deals with a segment of the decision of the lower court which is not on appeal before this tribunal. However, we will address this matter only to clarify the situation at bar, which is Eddie Thompson's alledged grievance.

It is well established in the case law of the Commonwealth of Kentucky that the governing power of the corporation is vested in the Board of Directors, which can only bind the corporation when acting as a body. *Har-Bel Coal Co.* v. *Asher Coal Mining Co.,* (Ky.) 414 SW 2d 128 (1966). In *Har-Bel Coal Co.,* supra, the court stated the following:

> "Authority to bind the corporation must come either from the by laws or the board of directors, or the action of the officer must be of the nature that comes within the apparent scope of his employment. . . . the mere representation of a claimed agent, even when coupled with signing a paper in such capacity, are not sufficient to show his agency or the extent thereof." *Id.* at 130.

Even this power is negated in the event of internal corporate dissension regarding the propriety of the suit. *Contee Construction Co.* v. *Cay Construction Co.,* Fla. 221 So 2d 792 (1969); Note, 50 Ky. L. J. (1961).

The Kentucky Legislature has also acted in the area in which this court is now reviewing. Section 271A.250 (2) of the Kentucky Revised Statutes (hereinafter KRS) states the following:

> "All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be determined by resolution of the board of directors not inconsistent with the by laws."

Although the HDC was incorporated under KRS Chapter 273, the provision of KRS Chapter 271.A are applicable to "any relating to a corporation of that kind either are unconsistent with this chapter or state that the provisions of this chapter not apply to it." KRS 271A.015 (1).

Both the aforesaid cases and statute restrict the actions of all corporate officers and agents to only those stated in the by laws or authorized by the board of directors. Therefore, in order for Thompson to have the authority to file this suit, such power must have been vested in him by either the by laws or by resolution from the board of directors.

The Board of Directors of HDC did not authorize Thompson to initiate this proceeding.

A review of the records will plainly show that Eddie Thompson never received board authorization in filing this suit. First, the chairman of the board of the HDC, Broadus Blythe, has testified under oath in his deposition that the Board of Directors did not give the petitioner, Thompson, the authority to file this action in the Corporation's behalf. (Blythe Deposition, Questions 23, 75 to 80, inclusive).

Secondly, the petitioner's failure to produce records of the Board which specifically sanction this action ignores the "well settled doctrine that a corporation can only act through its directors at an official meeting regularly held, and that its acts can be proven only by the records of such meetings". *Bastin* v. *Givens, Admrx.,* 170 Ky. 201 (1916); *Clay* v. *Mt. Holly Development Company,* Ky., 646 SW 2d 621 (1971); *Star Mills* v. *Bailey,* 140 Ky. 194 (1910). The fact that no "official meeting" of the Board ever sanctioned this action is one even admitted to by the petitioner himself. (Thompson's Deposition Question 36). Thompson's reliance

on informal conversation with some of the Board Members for authorization to commence this suit negates the principle that a business will not be bound by agreements secured among isolated directors. *Caddy Oil Company* v. *Sommer,* 186 Ky. 843, 847; see 19 Am Jur 2d "Corporations", Section 1157.

It is evident that the Board of Directors of HDC never formally authorized the initiation of this suit.

The by laws did not grant the Executive Director the power to initiate this suit.

The fact that Thompson fails to get the board to authorize the filing of this suit leaves the by laws as his only possible means for authorizing it. A review of the facts will show that the by laws do not grant the Executive Director the power to initiate a suit of this magnitude.

The by laws of the HDC creates the position of Executive Director and defines his duties. Article 5, Section 4, of the by laws reads as follows:

> The Executive Director shall be the Chief Executive Officer of the corporation. He shall have custody of the Corporation funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation. He shall deposit all monies and other valuable effects in the name, and to the credit of the corporation in such depositories as may from time to time be designated by the Board of Directors. He shall have all of the general powers and duties which are usually vested in the office of the Chief Executive Officer of the Corporation.

Since the power to initiate suits is not among those powers which are specifically given to the Executive Director, the petitioner must believe that the power rests

within the general powers of that office. However, it is well settled that a manager's authority is limited to the conduct of ordinary business affairs:

> (T) he general business of corporations is frequently entrusted to the management of a general manager . . ., who has the power to bind the corporation by acts within the scope of his apparent authority. Such authority is not limited by the fact that the general manager is also the president or other officer of the corporation, for it is not incident to such other office, but is incident to the management of the business . . . . He has been deemed by numerous authorities to be the principal officer of the corporation, having general charge of those business matters for the carrying on of which the company was incorporated, and he has the implied or ostensible power to do any act which is usual or necessary in the ordinary transaction of the company's business. 19 Am. Jur. 2d "Corporations" Section 1174, p. 599.

See Also *Gaddie v. Collins of Kentucky,* Ky., 248 S.W. 2d 722, 723 (1952). It is evident that this litigation relates not to the ordinary business affairs of the corporation, but rather is an extraordinary attempt outside the usual course of business.

It should be further noted that the minutes of the Board of Directors for the October 25, 1972 meeting state: "Mr. Thompson also makes it clear anything he does needs Board approval." It is also questionable as to whether Eddie Thompson was the Executive Director at the time this action was filed or, for that matter, at the present time, when the corporate minutes of November 29, 1972 are considered.

Also, the minutes of the Board of Directors of the HDC for March 13, 1973, terminated all employees, including the Petitioner, effective as of March 16, 1973, and other-

wise terminated the entire enterprise. The District Court was aware of this as it referred to the fact that this litigation was not in the ordinary course of business but rather was an attempt to revive an enterprise which the corporation had ordered terminated.

As to the petitioner's reliance on *Elk Valley* v. *Thompson,* 150 Ky. 614, 150 S.W. 817, a careful analysis of the case discloses that it affords no more support to the Petitioner's argument than do the other cases cited in his petition.

In *Elk Valley* the appellee received a judgment from the lower court which executed a contract that was enacted by the general manager without the authorization of the Board of Directors. In overruling the lower Court, the Court of Appeals stated the general rule which the Petitioner so wholeheartedly contends authorized his initiation of this suit in the name of the H.D.C. (Petitioner's Brief p. 8) However, Eddie Thompson's position must fail for the exact same reason that H. C. Thompson failed in the aforesaid case. The court stated:

> Applying to the facts of this case these well established principles, the case of H. C. Thompson must fail for two reasons: (1) It is not clearly shown that the corporation derived any benefit from his services . . . . Nor does it appear that he suffered any loss by the failure of the directors, when their attention was called to the fact that he had a contract, to promptly disaffirm it. (2) It is not shown that the directors, who, according to H. C. Thompson knew of the contract, were advised fully or at all of the circumstances surrounding its execution. It only appears that they knew of the existence of the contract.

A brief look at the factual background of this action shows that the H.D.C. has not been shown to have derived

any benefits from this suit. In fact, this suit, as well as Eddie Thompson, has proven to be a detriment to the H.D.C. in that the Corporation has been charged with the responsibility of paying previous court costs.

Further, the petitioner has likewise failed to show that the directors who, according to him knew of this suit, were advised fully or at all of the circumstances surrounding its initiation.

It is evident that Blythe, the Chairman of the Board of Directors, did not know the underlying circumstances surrounding this litigation for he testified that there was no action that would lead him to believe that the H.D.C. was closed on account of racial reasons. (Question 90, Blythe Deposition) Therefore, acknowledging the fact that he knew of no factual basis or circumstances for Thompson's charges of racial discrimnatory practices by the Respondents.

Thus viewed, the *Elk Valley Coal Co.* decision is of no assistance to the Petitioner.

Thompson's query into the matter of the legality of suing a party in his representative capacity and then saying that said party cannot sue in this representative capacity is totally unmeritorious in that such a sequence never occured among the parties involved in this litigation. An examination of the record will reveal that there are no facts which show that the Petitioner was sued in his representative capacity as the General Manager of the Corporation. Also, it should be noted that this question was not raised in the petitioner's brief filed in the Sixth Circuit Court of Appeals.

III. THE MODEL CITY PROJECT IN WHICH EDDIE THOMPSON WAS ASSOCIATED WAS NOT PHASED OUT ILLEGALLY BY THE RESPONDENTS. THUS NONE OF THE PETITIONER'S RIGHTS WHICH ARE GUARANTEED BY THE FOURTH, SIXTH, AND FOURTEENTH AMENDMENTS TO TITLE 42, U.S.C. SECTIONS 1981 AND 1983 HAVE BEEN TRANSGRESSED.

The employees of a Model City project which is proven to have been illegally phased out for racial reasons would be entitled to any back wages owing to them. However, that is not the case in Thompson's situation for such a racial premise has never been proven to have existed. As previously mentioned in the facts of this proceeding, the HDC project was merely on hold when the Federal Moratorium of January, 1973 was put into effect. It was this moratorium which was the underlying cause for the termination of Model City project with which the petitioner was involved. Thompson's allegation that the respondents caused the curtailment of said project is not one based on actual factual references which this Court can view of their merits, but rather is one based on a fantasy that Thompson's mind can alone grasp.

There exists no proof whatsoever that the respondents, Bernard Grimm, James Simpson, William Sageser, Carl Bowman, and George Wermeling, who are the Mayor and City Commissioners of the City of Covington, violated any of Thompson's federally protected rights in their dealings with the Model City program. In fact, the Petitioner's

testimony in his deposition reveals, from his own mouth, that there is and was no discrimination against him by them. (Questions 181 to 190, inclusive; Question 316; Questions 684 and 685; Questions 756 to 764, inclusive, and the answers thereto of Thompson's Deposition)

The Petitioner's charges against Joseph Condit, Bill Woods, Paul Royster, June Hedrick and Dan Wolfe are likewise devoid of any supporting evidence.

The Model City program with which Thompson was associated was in its infancy and as late as December 26, 1972, had no idea of what they were going to do. Thus it is obvious that, when the Federal Moratorium was announced on January 5, 1973, Eddie Thompson and the Covington Housing Development Corporation, on their own part and knowledge, were woefully lacking and that any deficiencies were a product of theirs and not others, Further, the Court should note that the H.D.C. was not the only segment of the Model City Program involved in the freeze of monies, for the entire Program was supposed to be phased out by July 7, 1973.

It is apparent that the Petitioner has no personal remedy for injuries suffered by the Covington Housing Development Corporation. *Mullins* v. *First National Exchange Bank of Virginia,* W.D. Va., 275 F.Supp 712, 721 (1967).

North City Area-Wide Council, Inc. v. *Romney,* 469 F2d 1326 (1972) and *Rodriquez* v. *Barcelo,* 358 F.Supp 43 (1973) which are cited by the Petitioner in his behalf, can easily be distinguished from the case at bar because in those proceedings, the plaintiffs' allegations were supported by facts in which the courts could base a decision. Thompson's case is made up of a series of unproven allegations.

As for the Petitioner's allegation that he has been forced into involuntary bankruptcy by the City and its officials, he is again attempting to play on the passions of this Court. First, Thompson has testified in his deposition that he was employed from June 13, 1973 to September 25, 1973 at the Housing Development Corporation in Cincinnati at a salary of $362.00 per week and at the Turner Construction Company from October 23, 1973 to at least the date of the deposition, November 29, 1973, at the yearly salary of $13,900.00. Also, it is well worth noting that the petitioner presently owns the following real property:

1) His home at 734 Highland Avenue, Covington, Kentucky Purchased on February 1, 1966. Assessed value for 1974 is $15,000.00

2) A building on the N.W. corner of Greenup and Robbins Streets. Purchased on August 8, 1973. Assessed value for 1974 is $7,000.00.

3) A building at 309 Pleasant Street, Covington, Kentucky. Purchased on February 2, 1974. Assessed value for 1974 is $8,500.00.

Thompson also owns stock in the American Urban People's Economic Development Company, which is a corporation for profit located in Covington, Kentucky. Further, in January or February of 1975, the petitioner purchased a 1969 Oldsmobile, and there are no liens of record against this automobile. Thus, he must have paid cash for it.

Although, in all due fairness to the Petitioner, we do not claim to know the duration of his employment at the Turner Construction Company, however, it is still evident that the termination of the Model City Program in 1973

did not force him into the state of dispair as he has led this Court to believe.

In responding to that segment of the Petitioner's allegation which states he was injured by the illegal phasing out of the Model City Program, we will first remind this Court that there is no evidence on which the Petitioner's accusation of illegality can be grounded. Secondly, if in fact Thompson was injured by the phasing out of the Model City Program, his remedy would not rest with any of the named respondents, but would lay exclusively with that section of the Federal Government which ordered the 1973 Moratorium (which was not illegal).

CONCLUSION

The Petition has not shown that there are any reasons for a Writ of Certiorari to be issued for the review of this case pursuant to Rule 19 (1) of the Rules of the Supreme Court of the United States.

The record of the District Court contains, in the Petitioner's behalf, only his complaint. However, the deposition of Broadus R. Blythe, Chairman of the Board of Directors of the Corporation, the deposition of the Petitioner, himself, the interrogatories and answers thereto and the official corporate minutes of the corporation are contrary to and disprove totally the allegations of the complaint. Thus, the District Court acted properly in granting Summary Judgment. On review, the Sixth Circuit Court of Appeals independently reviewed the record and arrived at the same conclusion that the respondents were entitled to Judgment in their favor as a matter of law.

The decision of the United States District Court for the Eastern District of Kentucky as well as the Sixth Circuit Court of Appeals were legal, just and proper.

Respectfully submitted,

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No. 75-170

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EDDIE THOMPSON, JR., PETITIONER

v.

CITY OF COVINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
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Petitioner, Executive Director of the Covington Housing Development Corporation, brought this action on behalf of himself and that Corporation under 42 U.S.C. 1981 and 1983 against the City of Covington, Kentucky, several city officials, and two former employees of the United States Department of Housing and Urban Development (HUD). The complaint alleged that the Corporation had contracted with the City of Covington for the development of a housing complex pursuant to the Demonstration Cities and Metropolitan Development Act of 1966, 80 Stat. 1255, as amended, 42 U.S.C. 3301 *et seq.*; that because petitioner is black, city officials deliberately misrepresented certain facts to HUD in a successful attempt to prevent further funding of the project; and that the resulting publicity damaged his

reputation (Pet. 13-14). The complaint sought damages to the corporation or renewed funding for the project, and personal damages to petitioner (Pet. 19).

On December 18, 1973, the district court dismissed the complaint as to the City of Covington on the ground that a municipality is not a "person" within the meaning of the Civil Rights Act, 42 U.S.C. 1981 *et seq.* (Pet. 9-10). On June 27, 1974, the district court dismissed the complaint against the federal defendants on grounds of sovereign immunity and failure to exhaust administrative remedies (Pet. 12-17). On September 11, 1974, the district court dismissed the complaint as to the remaining individual defendants on the ground that petitioner lacked authority to sue on behalf of the corporation (Pet. 18-25).

The court of appeals affirmed (Pet. 27-28) in an opinion on which we rely (*id.* at 28):

> The district court correctly held that the individual plaintiff Thompson was not authorized to initiate or prosecute this action on behalf of his corporate employer. The record discloses no direction to sue or consent by the board of directors of HDC to this suit on behalf of the corporation by Thompson.
>
> In the complaint Thompson also sought relief for violation of his civil rights. He may not recover personally for wrongs allegedly suffered by the corporation which he directed. He and the corporation are separate beings in the eyes of the law. We have carefully searched the record for evidence that the civil rights of the plaintiff Thompson have been infringed by any of the defendants-appellees and have found none. The district court had no jurisdiction over claims of slander by the defendants or injury to Thompson's reputation. It could only consider infringement of rights protected by the United States Constitution or the Civil Rights Act under which this action was brought, 42 U.S.C. §§1981 and 1983. Our review of the record leads to the conclusion that no showing of such infringement was made, and that the defendants were entitled to judgment in their favor as a matter of law. Under these circumstances summary judgment was properly granted.

In addition, we note that the claim against the federal respondents (the two HUD employees) for renewed funding of the housing project is without merit in any event.[1] Those employees had no ability or authority to provide funding to the Covington Housing Development Corporation. See *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 603. If the action is therefore treated as one against the United States (*Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682), the relief sought would require affirmative government action or would deplete public funds. But since the complaint did not allege that the HUD employees had acted unconstitutionally or exceeded their authority, the suit is therefore barred by sovereign immunity. *Larson* v. *Domestic and Foreign Commerce Corp., supra; Land* v. *Dollar*, 330 U.S. 731.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[1]The two HUD employees, Hobart Wooten and Roger Carlton, were HUD's area representatives in the Louisville, Kentucky area. Wooten is now deceased (Pet. 14).

[2]Moreover, petitioner did not allege that he attempted to comply with "administrative remedies validly established by regulation * * *" (*National Lawyers Guild* v. *Brownell*, 225 F.2d 552, 557 (C.A.D.C.), certiorari denied, 351 U.S. 927; see 24 C.F.R. Parts 1 and 2), or that exhaustion of such remedies would have been futile. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.